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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 312

JOEL SIMON MEYERS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALAN H. LEVINE
c/o New York Civil
Liberties Union
156 Fifth Avenue
New York, New York

THOMAS H. BAER
345 Park Avenue
New York, New York

Attorneys for Petitioner

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JOEL SIMON MEYERS,

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on January 28, 1969.

Opinions Below

The decision of the Court of Appeals is not officially reported. It is unofficially reported at 1 SSLR 3335 and is set out in the Appendix, *infra*, pp. 1a-9a. The dissenting opinion of Circuit Judge Smith is set out at p. 9a of the Appendix.

Jurisdiction

The judgment of the Court of Appeals was entered on January 28, 1969. On February 19, 1969, Mr. Justice Har-

lan entered an order extending until March 29, 1969 the time for filing a petition for writ of certiorari. On March 7, 1969, the Court of Appeals granted a motion for leave to file a Petition for Rehearing and Rehearing in *Banc,* which Petition was denied on May 5, 1969. On June 9, 1969, Mr. Justice Harlan entered an order extending until July 3, 1969 the time for filing this petition for certiorari. Jurisdiction is conferred on this Court by 28 U. S. C. §1254(1).

Questions Presented

1. Petitioner was forcibly ejected from the induction station for leafleting several hours before the induction ceremony. Did the failure to give him the warning prescribed by AR 601-270, paragraph 40*c*, or any other warning, at the time of his ejection from the station, that he was subjecting himself to conviction for the felony of induction refusal, deprive him of a clear opportunity to know the consequences of his actions in violation of Army Regulations and the due process clause of the Fifth Amendment?

2. The district court gave the "Allen charge" in a case of a two-count indictment after a trial of just over one day with only six witnesses, after less than three hours of deliberations by the jury, and after the court had been advised that the jury was deadlocked 11-1 for conviction on both counts. Under these circumstances, does its use (*a*) violate the due process clause of the Fifth Amendment, or (*b*) so far exceed the limited circumstances under which it has customarily been used as to justify the exercise of this Court's power of supervision to regulate the use of the Allen charge.

3. Is the "Allen charge" inherently coercive of the minority of jurors, thus depriving the petitioner of the fair deliberations to which he is entitled under the due process clause of the Fifth Amendment?

Statutes and Regulations Involved

Military Selective Service Act of 1967, Sec. 12(a); 50 App. U. S. C. Sec. 462(a), is set out in the Appendix, *infra*, pp. 10a-11a.

Army Regulation 601-270, para. 40*c*, is set out in the Appendix, *infra*, pp. 11a-13a.

Statement of the Case[1]

Petitioner, registered with Local Board No. 35 in Brooklyn, was ordered to report for induction on May 4, 1967 at Fort Hamilton, New York. He arrived at the induction center on that day at approximately 7 a.m., went to a control room where other inductees were seated waiting for the pre-induction orientation, and handed out leaflets protesting the war in Vietnam. When the enlisted man who ran the orientation program entered the room, he asked petitioner to stop leafleting. Petitioner continued to leaflet.

The military police arrived and led him to the back of the room where they discussed his rights on a federal reservation (T. 146-47). They then physically removed petitioner to the office of the Provost Marshal where he remained

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[1] Except for those facts which are supported by references to the transcript of trial (designated by the letter "T"), the Statement of the Case is based upon the opinion of the Court of Appeals.

for about 15 minutes before being escorted out of the Fort Hamilton gate (T. 148). The time was approximately 8:30 a.m. (T. 141-42; 148). The induction ceremony generally takes place between 3 and 4:30 p.m. (T. 121).

The petitioner was indicted on August 1, 1967 in a two-count indictment charging him with failure to report for and submit to induction (Count I) and hindering and interfering, by force, violence and otherwise, with the administration of the Selective Service Act (Count II), in violation of Title 50 App., U. S. C. Sec. 462(a). His trial, which was before a jury, lasted just over one day.[2] Six witnesses, all government employees, testified.

The jury deliberated approximately two hours and 50 minutes before reporting back to the judge at around 4:10 p.m. that they were deadlocked 11 to 1 for conviction on each charge. The judge, after commenting on "the length of the trial, the amount of testimony that was taken, the number of witnesses that have been heard . . ." (T. 289), read the Allen charge. The jury left the courtroom and returned at around 4:30 p.m. with a verdict of guilty on Count I and not guilty on Count II.

Petitioner was sentenced to four years' imprisonment. The conviction was affirmed by the Court of Appeals, Circuit Judge Smith dissenting, on January 28, 1969. Judge Smith stated that petitioner should have been given an opportunity to change his mind and take the oath before being charged with a refusal to submit to induction (Ques-

[2] The trial began on April 3, 1968 at 11:30 a.m. and continued that day until 4:30 p.m. The next day, court reconvened at 11:30 a.m. and testimony was taken for one hour, at which point the Government and defense rested. Both sides gave summations and the jury was charged the following morning.

tion 1, *supra*) and that the giving of the Allen charge under the circumstances of this case was improper (Question 2, *supra*).

Reasons for Granting the Writ

1. Certiorari should be granted because the decision of the Court below, upholding the failure to give the warning prescribed by Army Regulations, is in conflict with decisions of the Third, Sixth and Ninth Circuits and violates established notions of due process.

It is a fundamental principle of due process that one is entitled to "fair warning" that conduct is criminal before it may be the subject of prosecution. *Bouie* v. *Columbia*, 378 U. S. 347, 350 (1964). *Accord, Winters* v. *New York*, 333 U. S. 507 (1948). In accordance with that principle, the army has adopted a series of regulations governing induction station procedures which prescribe the actions to be taken by station personnel when a registrant expresses an intention not to submit to induction. AR 601-270, para. 40*c*, App., *infra*, pp. 11a-13a, provides that a registrant who refuses to submit to induction will be advised that he is liable to conviction for a felony, with a maximum penalty of five years' imprisonment and $10,000 fine. He will then be given a second opportunity to be inducted. The regulations then prescribe that upon persisting in his refusal he will be requested to execute a signed statement that he refuses to be inducted into the Armed Forces of the United States.

The procedure is designed to avoid any uncertainty as to the moment when a civilian passes into military jurisdiction, *Corrigan* v. *Secretary of Army*, 211 F. 2d 293 (9th Cir. 1954), and also to give the registrant a "last clear

chance to change his mind." *Chernekoff* v. *United States*, 219 F. 2d 721, 725 (9th Cir. 1955).

Although the jury found that the defendant did not intend to submit to induction when he appeared at the Examining Station, such intention does not excuse the failure of the Army to give the warning required by its own regulations.

The holding of the majority below that the regulation need not be followed where the registrant has manifested an intent not to submit to induction directly contradicts the holding of the Court of Appeals for the Ninth Circuit in *Chernekoff* v. *United States, supra.* In that case the registrant reported to the induction station and gave a statement that he refused to submit to induction. Despite this clear statement of intent, the court held that he "should have been given the opportunity granted him by the Army's own regulation to seriously reflect . . . " 219 F. 2d at 725. The court noted that it was not relevant that he might not have changed his mind, the regulation being "couched in mandatory, not discretionary, language." *Ibid.* The regulation itself, providing for an elaborate warning and a second opportunity to submit, reflects a clear predisposition by its authors to go beyond initial expressions of intent, however clear. The requirement is appropriate, amply justified by the tensions surrounding the induction process and the not infrequent situation where an initially hesitant registrant decides to accept induction.

The need for the regulation's warning of possible criminal prosecution is clearly demonstrated by the facts of this case. Although petitioner was leafleting during the orien-

tation process against the wishes of the station personnel who were present, he did not—according to the jury's verdict on Count II of the indictment—"hinder and interfere" with the induction process. Nevertheless, when he refused to desist, he was forcibly ejected with no warning at all that his leafleting had subjected him to two felony prosecutions.

The principle of *Chernekoff* has recently been endorsed by the Third Circuit in *United States* v. *Kroll*, 402 F. 2d 221, 222 (1968) ("a registrant is not guilty of a crime until he has been given the prescribed warning concerning penalties") and the Sixth Circuit in *Anderson* v. *Hershey*, —— F. 2d ——, 2 SSLR 3015, 3016, n. 10 (April 11, 1969) ("failure to warn a registrant at the induction ceremony of the consequences of refusing induction can invalidate a conviction"). In addition, the Ninth Circuit has on at least three occasions cited its decision in *Chernekoff* approvingly. *Parrott* v. *United States*, 370 F. 2d 388, 395, *cert. denied* 387 U. S. 908 (1967), *Edwards* v. *United States*, 395 F. 2d 453, 457, *cert. denied* 393 U. S. 845 (1968), *Oshatz* v. *United States*, 404 F. 2d 9, 12 (1968). *See also, United States* v. *Sloan*, 2 SSLR 3004 (N. D. Cal., Mar. 26, 1969).

Petitioner seeks an endorsement of the principle that selective service personnel are not free to ignore their own regulations to the prejudice of individual registrants. *Cf. Service* v. *Dulles*, 354 U. S. 363 (1957). We agree with the court in *Oshatz* v. *United States*, *supra*, that, although minor procedural irregularities not resulting in prejudice to the registrant may not justify reversal of a conviction, irregularities such as that in *Chernekoff* and in the instant case are so fundamentally prejudicial as to deprive the registrant of due process. It is this approach which the

courts have consistently followed with regard to selective service regulations, *Johnson* v. *United States*, 285 F. 2d 700 (9th Cir. 1960); *Knox* v. *United States*, 200 F. 2d 398 (9th Cir. 1952), and which the court in *Briggs* v. *United States*, 397 F. 2d 370, 373 (9th Cir. 1968), says must be applied to the Army Regulations.

With the exception of the court below, the decisions have in fact adopted that approach with regard to AR 601-270. Though minor deviations from its prescription have been tolerated, counsel has not found one reported case sustaining a conviction since its promulgation where some warning was not given to one who appeared at the induction station. Thus, in *Bradley* v. *United States*, 218 F. 2d 657 (9th Cir.), *rev'd on other grounds*, 348 U. S. 967 (1955), the court held that the failure to administer the formal induction ceremony prescribed by the regulations did not preclude conviction for refusal to submit. Nevertheless, it was noted that the registrant had been taken into another room where a sergeant explained the penalty for refusing to submit. The registrant then signed a statement that he refused to be inducted. In the court's words:

> "He was told the penalty for refusal to submit to induction, and he stated understandingly and positively that he would not submit." *Id.* at 660.

Similarly, in *Parrott* v. *United States*, *supra*, there was a slight deviation from the formal procedure required by the regulations. Nevertheless, citing *Chernekoff*, the court found that the registrant "had not only warning, but full knowledge of the precise penalty." 370 F. 2d at 395.

In other words, even where, for one reason or another, the precise procedure may not or could not have been ad-

ministered, courts have at least demanded that the registrant be fully apprised of the consequences of his refusal to submit. According to the Government's testimony, several persons could have warned the petitioner that his actions were the equivalent of a refusal to submit to induction. One member of the Military Police testified to a conversation with the defendant at the time of his ejection in which he stated his authority over civilians on a federal reservation (T. 146-47). He or his partner, who was also with the defendant, certainly could have added something about the consequences of being ejected. He then testified that he and his colleagues took the defendant to the Military Police station and subsequently to the Provost Marshal's office, where he remained at least fifteen minutes. During this period before being ejected from the Fort, there was absolutely no excuse why the warning required by the regulations could not have been given to the petitioner. As Circuit Judge Smith said in dissent, he was "entitled to an opportunity to change his mind and take the oath before being charged with a refusal to submit to induction." App., *infra*, p. 9a.

Whether under the circumstances of this case it is the requirement of due process or Army Regulations which were offended matters little. Both protect persons from running the risk of criminal prosecution without a clear warning of the consequences of their actions. Where, as in this case, a warning could so easily have been given, its absence is so prejudicial as to vitiate a conviction.

Petitioner respectfully submits that this Court should resolve the conflict between the case at bar and the *Chernekoff* line of cases so as to insure that induction station personnel do not ignore procedures which have been established to insure fairness to registrants.

2. Certiorari should be granted so that this Court may re-examine the continuing validity of the Allen charge, or at the least, reconcile the divergent practices regarding its use which have been adopted in the circuit and district courts.

Since the approval by this Court in *Allen* v. *United States,* 164 U. S. 492 (1896), of the supplemental charge to deadlocked juries now commonly known as the "Allen charge," only two cases in this Court, *Burton* v. *United States,* 196 U. S. 283 (1905) and *Brasfield* v. *United States,* 272 U. S. 448 (1926), have reviewed the propriety of the Allen charge. Both of those dealt only with the limited situation where a judge inquires as to the division of the jury before giving the charge. The practice was condemned.[3] But in recent years the use of the Allen charge itself has come under increasing attack. Several opinions in the Fifth Circuit point out the deficiencies of the charge. See *Thaggard* v. *United States,* 354 F. 2d 735, 739 (5th Cir.), *cert. denied,* 383 U. S. 958 (1966) (Coleman, *J.*, concurring); *Walker* v. *United States,* 342 F. 2d 22, 27 (5th Cir.), *cert. denied,* 382 U. S. 859 (1965) (Brown, *J.*, dissenting); *Green* v. *United States,* 309 F. 2d 852, 854 (5th Cir. 1962); *Andrews* v. *United States,* 309 F. 2d 127, 129 (5th Cir.), *cert. denied,* 372 U. S. 946 (1965) (Wisdom, *J.*, dissenting); *Huffman* v. *United States,* 297 F. 2d 754, 755 (5th Cir.), *cert. denied,* 370 U. S. 955 (1962) (Brown, *J.*, dissenting).[4] In addition, commentators have pointed to the

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[3] In *Jenkins* v. *United States,* 380 U.S. 445 (1965), the Court reversed a conviction because the Allen charge was given in conjunction with a direction to the jury "to reach a decision in this case."

[4] In addition, two states have prohibited the use of the Allen charge. *State* v. *Randall,* 137 Mont. 534, 353 P. 2d 1054 (1960); *State* v. *Thomas,* 86 Ariz. 161, 342 P. 2d 197 (1959). Courts in

inherently coercive nature of the charge and have called for its abandonment. *See* Comment, "Deadlocked Juries and Dynamite: A Critical Look at the 'Allen Charge'" 31 U. CHI. L. REV. 386 (1964); Note, "Due Process, Judicial Economy and the Hung Jury: A Reexamination of the *Allen* Charge" 53 VA. L. REV. 123 (1967); Note, 34 TULANE L. REV. 214 (1959); AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, TRIAL BY JURY, 146-56 (Tent. Draft, 1968).

The Allen charge raises serious constitutional questions. A defendant is entitled by the 5th and 6th amendments to a trial by a free and independent jury. This means and ought to mean a jury free of every influence except the law and evidence. *See, e.g., Irvin* v. *Dowd,* 366 U. S. 717 (1961); *Sheppard* v. *Maxwell,* 384 U. S. 333 (1966); *Estes* v. *Texas,* 381 U. S. 532 (1965). *See also, Turner* v. *Louisiana,* 379 U. S. 466 (1965).

The Allen charge is an invasion of the jury's province by the court which encroaches upon the constitutional right to trial by jury. The qualifications frequently used in modern versions of the charge do not save it from being taken as a command from the bench for a verdict. The words of Chief Judge Brown merit the serious consideration of this court:

> "The fact is that in many phases of criminal law we have come a long, long way since 1896. There is no longer any place for the Allen charge . . . In the final analysis the Allen charge itself does not make sense.

Idaho, Iowa, Alabama and Kansas have discouraged the use of the charge. *State* v. *Moon,* 20 Idaho 222, 117 Pac. 757 (1911); *Middlestate Util. Co.* v. *Incorporated Tel. Co.,* 222 Iowa 275, 271 N. W. 180 (1937); *Crowe* v. *State,* 23 Ala. 271, 124 So. 121 (1929); *State* v. *Neff,* 169 Kan. 116, 218 P. 2d 248 (1950).

> All it may rightfully say is that there is a duty to consider the views of others but that a conscientious person has finally the right and duty to stand by conscience. If it says that and nothing more it is a superfluous lecture in citizenship. If it says more to declare that there is a duty to *decide*, it is legally incorrect as an interference with that rightful independence." *Huffman* v. *United States, supra*, 297 F. 2d at 759 (dissenting opinion).

If the Allen charge is not repudiated outright, this Court should at least delineate the circumstances under which it may properly be given. Whatever guidelines governing its use have been articulated by circuit courts were ignored by the district court. If allowed to stand, the opinion below would sanction the indiscriminate use of the Allen charge and sweep aside the repeated warnings that the charge "approaches the limits" to which a trial court should go in asking jurors to reconsider their views. *See, e.g., United States* v. *Harris*, 391 F. 2d 348, 354 (6th Cir.), *cert. denied*, 393 U. S. 874 (1968); *United States* v. *Rogers*, 289 F. 2d 433, 435 (4th Cir. 1961). *Accord, United States* v. *Smith*, 303 F. 2d 341, 343 (4th Cir. 1962).

In the Allen charge cases since 1896, several indicia of coercion have emerged which, either by themselves or in combination, have justified reversal of a conviction; this case has the rather extraordinary distinction of being the first to have every one of those indicia.

a. *Length and complexity of trial.* The two counts of petitioner's indictment grew out of one brief incident at the induction center. The testimony at trial, which took just over one day, was simple and uncontradicted. By contrast, every single court, including eight of the circuits,

which has discussed this question has noted, when upholding the charge, the length or complexity of the indictment or trial. See, *e.g., Estes* v. *United States,* 335 F. 2d 609 (5th Cir.), *cert. denied,* 379 U. S. 964 (1965) (17 day trial); *Tolub* v. *United States,* 309 F. 2d 286 (2d Cir. 1962) (12 count indictment); *Bowen* v. *United States,* 153 F. 2d 747 (8th Cir. 1946) (13 count indictment); *Mills* v. *Tinsley,* 314 F. 2d 311 (10th Cir. 1963) (ten day trial); *Muldrow* v. *Daly,* 329 F. 2d 886 (D. C. Cir. 1964) (eight day trial); *United States* v. *White,* 382 F. 2d 445 (7th Cir.), *cert. denied,* 389 U. S. 1052 (1968) (8 count indictment); *Wolin* v. *United States,* 211 F. 2d 770 (4th Cir. 1954) (one week trial); *Logsdon* v. *United States,* 253 F. 2d 12 (6th Cir. 1958) (35 count indictment).

Judge Bruchhausen, after a trial of barely one day with only six witnesses, explained the Allen charge by "considering the length of the trial, the amount of testimony that was taken, the number of witnesses that have been heard . . ." (T. 289). But these boilerplate references did not apply to this trial and, in Judge Smith's words, "the Allen charge was uncalled for in the circumstances of this brief trial . . . ." App., *infra,* p. 9a.

The one case which has discussed this issue directly condemned the use of the Allen charge when the indictment was "but a single count, and that was not complex." *United States* v. *Meisch,* 370 F. 2d 768, 774 (3d Cir. 1966). The court observed additionally that the testimony of the two witnesses was "brief and to the point." *Ibid.*

b. *Disclosure by the jury that it stands divided for conviction.* When the jury reported that it was deadlocked, the foreman volunteered the information that the jurors stood 11-1 for conviction on both counts. At that point, the trial

judge gave the Allen charge. As Judge Smith pointed out, the charge was "necessarily coercive here, since the lone dissenter presumably knew that the judge had been informed that only one juror was holding out for acquittal." App., *infra*, p. 9a.

One circuit court has explicitly adopted Judge Smith's position. In *Mullin* v. *United States*, 356 F. 2d 368 (D. C. Cir. 1966), Judge (now Chief Justice) Burger approved the declaration of a mistrial where the jury revealed that it stood 7 to 4 for conviction, with one undecided, "especially in a case involving less than two trial days." *Id.* at 370. *See also, Williams* v. *United States*, 338 F. 2d 530 (D. C. Cir. 1964).

It is true that most of the reported cases condemning such disclosure have involved requests for that information by the judge. *E.g., Brasfield* v. *United States*, 272 U. S. 449 (1926); *United States* v. *Dunkel*, 173 F. 2d 506 (2d Cir. 1949). However, the principle underlying such cases is that a small minority of jurors will tend to be coerced if, knowing that the judge knew of their numerical division, they believe that the warning to reconsider their views is directed at them. Their belief being the relevant factor, whether or not the judge acquires that knowledge by inquiry makes no difference. The prejudice to the defendant is the same whether the misconduct was the jury's or the judge's.

The majority below cited *Bowen* v. *United States*, 153 F. 2d 747 (8th Cir. 1946) to the contrary, but in fact *Bowen* intimated that if, as here, the court had been advised that the jury was split eleven to one on *every* issue, the charge would have been defective. But the court said that the jury's note revealed disagreement only on *some*

issues. It is pertinent to note, in addition, that recognizing some impropriety in even this limited disclosure, the court felt a mistrial inappropriate after such a "long and expensive trial" involving three defendants. *Id.* at 752.

Moreover, the jury in *Bowen* did not disclose whether it stood for conviction or acquittal. Though the Second Circuit did not comment on this factor below, ironically it suggested only last year that an Allen charge following a jury's disclosure of its division may only have been saved by the fact that "the jury did not reveal whether the majority were for acquittal or conviction. . . ." *United States* v. *Rao*, 394 F. 2d 354, 356 (2d Cir.), *cert. denied*, 393 U. S. 845 (1968).

c. *Length of deliberation between Allen charge and verdict.* After the jury reported that it was deadlocked 11-1 for conviction on both counts, the trial judge gave the Allen charge. The jury reported back less than twenty minutes later with a clear compromise verdict of guilty on Count I and not guilty on Count II. During that time, the lone dissenter was persuaded to join his co-jurors in finding petitioner guilty of failure to report, while eleven jurors who, during almost three hours of deliberation, had thought petitioner also guilty of interfering with the induction process, were persuaded to join the lone dissenter in acquitting on this charge. That all twelve jurors changed their votes during the twenty minutes following the Allen charge is dramatic evidence that they understood the charge to be a command to reach a verdict.

The language of the court in *United States* v. *Rogers*, 289 F. 2d 433, 436 (4th Cir. 1961) commenting on the short interval between the Allen charge and the verdict is particularly appropriate:

> "The time interval was quite long enough for acceptance of a theory of majority rule, but was hardly long enough to have permitted a painstaking re-examination of the views which the minority had held steadfastly until the charge was given."

This reasoning was approved by the Sixth Circuit in *United States* v. *Harris,* 391 F. 2d 348 (6th Cir. 1968) where there was also a short interval between the charge and the jury's decision.

In short, it may be said that no court has ever approved the use of the Allen charge under the circumstances of this case. Without further review by this Court its use may become indiscriminate.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

ALAN H. LEVINE
c/o New York Civil
Liberties Union
156 Fifth Avenue
New York, New York

THOMAS H. BAER
345 Park Avenue
New York, New York

Attorneys for Petitioner

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